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No. 99-1647

IN THE
Supreme Court of The United States

AMERICAN TARGET ADVERTISING, INC.
Petitioner,

v.

FRANCINE A. GIANI, DIVISION DIRECTOR,
UTAH DIVISION OF CONSUMER PROTECTION,
Respondent.

On Petition for a Writ of Certiorari
To the U.S. Court of Appeals for the Tenth Circuit

BRIEF OF FREE SPEECH DEFENSE AND EDUCATION FUND, INC., ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONER

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26 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESETTLE THE LAW GOVERNING IMPORTANT CONSTITUTIONAL PROTECTIONS 3

II. THE DECISION OF THE COURT OF APPEALS THAT THE UTAH ACT OPERATES AS A PERMISSIBLE PRIOR RESTRAINT CONFLICTS WITH THE FREEDOM OF THE PRESS AS AUTHORITATIVELY APPLIED BY THIS COURT 5

A. The Court Below Applied Inapplicable Precedents 5

B. Nothing in this Record Justifies the Imposition of a Prior Restraint 7

C. The Utah Act Confers Unconstitutional Editorial Power Upon the Government 9

III. THE DECISION OF THE COURT OF APPEALS TO APPLY "AN INTERMEDIATE LEVEL OF SCRUTINY" TO THE UTAH ACT CONFLICTS WITH APPLICABLE PRECEDENTS OF THIS COURT. 12

A. The Court Below Applied Inapplicable Supreme Court Precedents. 12

B. The Utah Act is Not Content Neutral. 14

C. The Utah Act Serves No Compelling Interest and Employs Impermissible Means to Prevent Fraud and Misrepresentation. ... 15

IV. THE COURT OF APPEALS DISREGARDED THIS COURT'S APPLICABLE PRECEDENTS AND ERRONEOUSLY DENIED THE PETITIONER'S COMMERCE AND DUE PROCESS CLAIMS 18

A. The Court of Appeals Ignored This Court's Minimum Standard Prohibiting Extraterritorial State Regulations under the Commerce Clause. 18

B. The Court Below Misapplied this Court's Jurisdictional Tests for State Regulations Under the Commerce and Due Process Clauses. 19

CONCLUSION 20

TABLE OF AUTHORITIES

U.S. CONSTITUTION — Page

Article I, Section 8 ..... 3, 18, 19, 20
Amendment I ..... 3, *passim*
Amendment XIV ..... 3, *passim*

STATUTES

Utah Code Ann. Secs. 13-22-1, *et seq.* ..... 4, *passim*

CASES

American Oil Co. v. Neill, 380 U.S. 451 (1965) 20
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 11-12
Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986) 18
City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993) 15
City of Ladue v. Gilleo, 512 U.S. 43 (1994) 14, 17
Edgar v. MITE Corp., 457 U.S. 624 (1982) 18
Freedman v. Maryland, 380 U.S. 51 (1965) 6, 7
FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) 5, 6
Healy v. The Beer Institute, 491 U.S. 324 (1989) 18-19
Lovell v. Griffin, 303 U.S. 444 (1938) 13
Martin v. City of Struthers, 319 U.S. 141 (1943) 10
Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) 15
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 9-10

Page

National Bellas Hess, Inc. v. Dept. of Revenue, 386 U.S. 753 (1967) 19, 20
Near v. Minnesota, 283 U.S. 697 (1931) 6, 8
New York Times v. United States, 403 U.S. 713 (1971) 6-7, 8, 9
Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 6
Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972) 15, 17
Quill Corp. v. North Dakota, 504 U.S. 298 (1992) .. 19, 20
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 13
Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 12-13
Riley v. National Fed. of the Blind of N.C., 487 U.S. 781 (1988) ..... 4, *passim*
Rowan v. Post Office Dept., 397 U.S. 728 (1970) 10-11
Sect'y. of State v. Joseph H. Munson Co., 467 U.S. 947 (1984) 4
Simon & Schuster, Inc. v. N.Y. Crime Victims Board, 502 U.S. 105 (1991) 15-16
Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975) 5-6
Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 4
Young v. American Mini Theatres, 427 U.S. 50 (1976) . 13

MISCELLANEOUS

4 W. Blackstone, *Commentaries on the Laws of England* (U. of Chi. Press, Facs. ed. 1979) 9
Roberts, James C., *The Conservative Decade* (1980) 8

INTEREST OF AMICI CURIAE

This *amicus curiae* brief is submitted on behalf of the Free Speech Defense and Education Fund, Inc. ("FSDEF"), a non-profit educational organization dedicated to defending First Amendment rights, as well as other nonprofit organizations and commercial firms seeking to protect their constitutional rights.[1] FSDEF, incorporated in Maryland in 1995, is a nonpartisan educational organization exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(3).

Joining as *co-amicus* is the Free Speech Coalition, Inc. ("FSC"), a nonpartisan IRC section 501(c)(4) organization dedicated to the protection of human and civil rights secured by law, such as the right of free speech at issue in this litigation. Its members include nonprofit organizations engaged in educational activities throughout the country and for-profit firms that serve such nonprofits.

Joining as *co-amici* are the following IRC section 501(c)(3) charitable/educational organizations that use direct mail nationwide in their educational and fundraising efforts: American Center for Law & Justice (DC), Inc.; American Civil Rights Union; American Conservative Union; American Health Assistance Foundation; American Studies Center; America's Future; America's Prayer Network; The Arthritis Trust of America; Center for the Defense of Free Enterprise; Christian Legal Defense Fund; Citizens United Foundation; Claremont Institute; Concerned Women for America; The Freedom Alliance; High Frontier; Jerry Falwell Ministries; The Leadership Institute; Lincoln Institute for Research and Education, Inc.; Media Research Center; Second Amendment

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

Foundation; U.S. Taxpayers Institute; World Emergency Relief; and Young America's Foundation.

The following IRC section 501(c)(4) organizations, that use direct mail nationally in their educational and fundraising efforts, also join as *co-amici*: The Abraham Lincoln Foundation for Public Policy Research, Inc.; American Policy Center; Americans Back in Charge Foundation; Americans for Tax Reform; Citizens Committee for the Right to Keep & Bear Arms; Citizens United; The Liberty Alliance; National Tax Limitation Committee; The Senior's Coalition; 60 Plus Association; Traditional Values Coalition; and United Seniors Association.

Finally, the following for-profit organizations join as *co-amici*. They, like petitioner, assist nonprofit organizations with their educational and fundraising programs: Concepts Direct, Inc.; Creative Response Concepts; the Delta Group USA, Inc.; Exempt Organization Tax Consulting; Lewis & Company Marketing Communications, Inc.; Morgan Meredith & Associates; Newport Creative Communications; Response Development Corporation; Richard Norman Company; Squire & Heartfield Direct, Inc.; Stephen Clouse & Associates, Inc.; and Stephen Winchell & Associates, Inc.

FSDEF and its *co-amici* have a strong interest in the matters raised in this litigation, as they may be both directly and indirectly affected by Utah's regulations. Moreover, Utah's licensing and registration requirements at issue in this case are just part of a national array of state and local laws and regulations which burden the dissemination of ideas nationwide.[2]

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[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk.

SUMMARY OF ARGUMENT

Certiorari should be granted to resettle the law that was misapplied by the court of appeals. Had the court of appeals adhered to applicable First Amendment principles governing prior restraints, it would have struck down the entire Utah Act. Had the court adhered to authoritative First Amendment principles governing regulations of core political speech, it would have found the Utah Act an unconstitutionally discriminatory regulation of the freedom of speech. Finally, had the court of appeals adhered to applicable Commerce and Due Process principles governing the territorial limits of state jurisdiction, as authoritatively applied by this Court, it would have found the application of the Utah Act to petitioner unconstitutional.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESETTLE THE LAW GOVERNING IMPORTANT CONSTITUTIONAL PROTECTIONS

In its decision below, the United States Court of Appeals for the Tenth Circuit erroneously applied the principles of this Court in two critical areas of First Amendment jurisprudence, and wrongly rejected the petitioner's Commerce Clause and Due Process challenges to a Utah statute that purports to regulate the business conduct and First Amendment activity of persons and organizations with no Utah contacts. The potential ramifications of this decision, particularly in this era of information explosion and communication on the Internet, cannot be overstated. If the decision below is allowed to stand, similar unconstitutional state legislation will proliferate, imposing ever greater burdens on core First Amendment activities.

At issue is Utah's Charitable Solicitations Act (the "Utah Act"), embodying state law provisions similar to the type found unconstitutional by this Court in Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), Sect'y. of State v. Joseph H. Munson Co., 467 U.S. 947 (1984), and Riley v. National Fed. of the Blind of N.C., 487 U.S. 781 (1988). The court of appeals struck down a portion of the statute, but left most of the provisions intact, incorrectly sustaining prior restraints on core First Amendment speech.

The Utah Act not only imposes licensing and disclosure requirements on nonresident, nonprofit organizations' messages sent to residences in the state, if the messages contain requests for charitable contributions — the lifeblood of many nonprofit organizations — it also regulates the nonprofits' nonresident consultants. The Utah Act requires such professional fundraising consultants to obtain a **license** before entering into a contract to enhance "core First Amendment Speech," even though that contract was entered into **wholly outside** Utah. Moreover, as part of the licensing process, the firm must make **detailed disclosures** of that consultant's methods, expenses, and fees in connection with the planned solicitation in the state, net profits of the previous calendar year earned from any of its consultative activities, the names and residence addresses of officers and directors, and its personnel's previous three-year employment histories.

The court of appeals below found these burdensome and intrusive licensing and disclosure requirements permissible, notwithstanding its finding that such requirements constituted a "prior restraint." 199 F.3d 1241 (10th Cir. 2000), Pet. Cert. App. at 9a-10a. Instead of subjecting the Utah Act to the constitutionally-required examination applicable to prior restraints, however, the court of appeals nibbled around the statute's unconstitutional edges, failing to apply strict scrutiny

to the state's claimed interest in protecting the people from fraud to justify overriding core First Amendment rights of American Target Advertising, Inc. ("ATA") and its nonprofit organizational client, Judicial Watch.

II. THE DECISION OF THE COURT OF APPEALS THAT THE UTAH ACT OPERATES AS A PERMISSIBLE PRIOR RESTRAINT CONFLICTS WITH THE FREEDOM OF THE PRESS AS AUTHORITATIVELY APPLIED BY THIS COURT.

A. The Court Below Applied Inapplicable Precedents.

Relying on Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975), and FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990), the court of appeals maintained that there were only "'two evils' that will not be tolerated" in any system of prior restraint: (1) "[N]o system of prior restraint may place 'unbridled discretion in the hands of a government official or agency,'" and (2) "'a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible.'" Pet. Cert. App. at 10a. Neither the cases cited, nor the two-part test enunciated, apply to this case where core First Amendment speech is mailed directly to homeowners.

In Southeastern Promotions, the speech at issue concerned a musical production which included group nudity and simulated sex. In FW/PBS, the speech in question emanated from sexually oriented businesses, including "adult" arcades, bookstores, video stores, cabarets, motels, theaters, as well as escort agencies, nude model studios and sexual encounter centers. In Southeastern Promotions, the question presented was the constitutionality of the standards employed by a government agency with authority to determine access to a government-

owned and operated municipal auditorium. In FW/PBS, the question presented was the constitutionality of a city ordinance licensing sexually oriented businesses.

Both cases dealt with "low" value speech, bordering on constitutionally unprotected obscenity, and therefore not subject to the higher standards governing prior restraints placed on core First Amendment speech. *Contrast* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 54-55 (1973) (state law authorizing injunction against publication of obscenity consistent with First Amendment so long as no restraint is imposed "until after a full adversary proceeding and a final judicial determination [that] the materials were constitutionally unprotected") *with* Near v. Minnesota, 283 U.S. 697 (1931) (state law authorizing injunction against "malicious, scandalous and defamatory" publication held unconstitutional even though no restraint imposed until after full adversary hearing and judicial determination that publication was constitutionally unprotected).

Because the normal rules governing prior restraints do not apply to sexually-explicit expression, this Court has developed distinct sets of substantive and procedural rules to govern such expressions. Substantively, the rules governing sexually-explicit material must conform to the constitutionally-prescribed definition of obscenity as determined by this Court. *See* Paris Adult Theatre I, 413 U.S. at 69-70. Procedurally, the exercise of the power of prior restraint with respect to such material must conform to the time safeguards of Freedman v. Maryland, 380 U.S. 51, 58-60 (1965).

Neither of these rules applies to the prior restraint of core First Amendment speech at issue in this case. As Justice Brennan observed in his concurring opinion in New York Times v. United States, 403 U.S. 713, 726, n. * (1971), the Pentagon Papers case:

> Freedman v. Maryland ... and similar cases regarding temporary restraints of allegedly obscene materials are not in point. For those cases rest upon the proposition that "obscenity is not protected by the freedoms of speech and press." ... Here there is no question but that the material sought to be suppressed is within the protection of the First Amendment.... [Citations omitted.]

The court of appeals below found that "charitable solicitations," like the publication of the Pentagon Papers, "qualify as protected speech for First Amendment purposes." Pet. Cert. App. at 3a. Yet it applied Freedman v. Maryland to support its ruling that the "ten-day" self-imposed administrative deadline for processing initial applications and renewals of registration is constitutionally sufficient to protect charitable organizations and their fundraising partners from any impermissible prior restraint. Pet. Cert. App. At 15a-17a. As this Court ruled in the Pentagon Papers case, however, where the government seeks prior restraint of core First Amendment speech, the question is whether it has overcome the "heavy presumption against [the restraint's] constitutional validity." 403 U.S. at 714.

B. Nothing in this Record Justifies the Imposition of a Prior Restraint.

The court of appeals found that the "Utah Act targets the secondary effects of professional solicitations, *i.e.*, increased fraud and misrepresentation." Pet. Cert. App. at 4a. Just because a prior restraint targets a "secondary effect" of core First Amendment speech does not mean that it meets the high constitutional standard required of prior restraints. In the Pentagon Papers case, Justice Brennan stated in his concurring opinion that "the First Amendment tolerates **absolutely no** prior restraints of the press predicated upon surmise or

conjecture that untoward consequences may result." New York Times, 403 U.S. at 725-26 (emphasis added).

Moreover, protecting the public from "increased fraud and misrepresentation" does not rise to the level of the extraordinary interest that the government must show to justify a prior restraint. According to this Court's precedents, "there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden ...." *Id.* at 726 (Brennan, J., concurring) (citation omitted). As Chief Justice Charles Evans Hughes wrote, any exception to "the deep-seated conviction" against prior restraints requires clear and convincing proof of an imminent danger of the highest order. Near v. Minnesota, 283 U.S. at 715-16, 718 (1931).

These rulings apply with special force in this case. ATA and its founder, Richard A. Viguerie, are pioneers in political direct mail. "When it comes to conservative fundraising one name stands out above all the rest: Richard A. Viguerie. Often referred to as the 'Godfather of the New Right,' ... his constituent response mailing[s] have inundated Congress with millions of postcards, letters, and petitions." James C. Roberts, *The Conservative Decade*, at 59 (1980). As the district court found in this case, ATA has continued its role in direct mail as the fundraising consultant employed by Judicial Watch, a "'political watchdog' organization," to "plan, manage and prepare materials relating to Judicial Watch's nationwide information distribution and fundraising program." (23 F.Supp.2d 1303 (D. Utah 1998), Pet. Cert. App. at 23a).

Although the court below found that "[m]andatory registration and disclosure enable Utah citizens to make informed decisions concerning their charitable donations," this record does not indicate that the information furnished to Utah ever reaches any Utah citizen. Nor does the statute require the

Director of the Division of Consumer Protection to publish the information contained in the filings that he receives. Thus, Utah has not met its "very heavy burden" to justify any prior restraint. *See* New York Times, 403 U.S. at 730 (White, J. concurring).

According to the controlling precedents of this Court, Utah cannot justify its prior restraint upon ATA and Judicial Watch any more that the United States could justify its attempted prior restraint upon *The New York Times* and *The Washington Post*. In this case, the state claims that its effort is to stop the secondary effects of increased fraud and misrepresentation; in the Pentagon Papers case, the government's effort was undertaken to stop the "secondary effects" of danger to the "national security." As this Court stated, the only remedy permitted by the First Amendment is a subsequent prosecution for violation of a valid law.

C. The Utah Act Confers Unconstitutional Editorial Power Upon the Government.

Not only does the First Amendment require a high threshold justification to uphold prior restraints, it denies to the government the exercise of editorial control that the freedom of the press secures to the people. This principle has been recognized since the days of Sir William Blackstone, who wrote in his *Commentaries* that "[e]very freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press...." 4 W. Blackstone, *Commentaries on the Laws of England* 151-52 (U. of Chi. Press, Facs. ed. 1979). Thus, this Court denied to the State of Florida power to force the state's print media to be "fair" to candidates in an election campaign, because this power would intrude upon the "function of editors" which

absolutely belongs to the media owners. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

This power of editorial control is not confined, however, to the speaker or publisher, but extends also to the hearer or recipient. Hence, this Court held in Martin v. City of Struthers, 319 U.S. 141 (1943), that it was unconstitutional for the city to interpose itself between a door-to-door hand biller and the homeowner. As Justice Hugo Black wrote for the Court:

> While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas....
>
> Freedom to distribute information to every citizen whenever **he desires to receive it** is so clearly vital to the preservation of a free society that, putting aside... regulations of time and manner of distribution, it **must be fully preserved**....
>
> The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offense for any person to ring the bell of a householder who has appropriately indicated he is unwilling to be disturbed. This ... **leaves the decision as to whether distributors may lawfully call at a home where it belongs — with the homeowner himself.** [*Id.* at 145, 147, 148 (emphasis added).]

In 1970, this Court reaffirmed the unalienable right of the householder to control what comes into his home. Chief Justice Warren Burger wrote:

> In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit

> every householder to exercise control over unwanted mail. [Rowan v. Post Office Dept., 397 U.S. 728, 736 (1970).]

Under the Utah Act, however, it is the Director of the Division of Consumer Protection — not the householder — who decides whether the householder will receive certain mail. It is the Director whom a charitable solicitor and its fundraiser must satisfy that they have not, for example, "materially misrepresented ... the purpose and manner in which contributed funds and property will be used in connection with any solicitation." Utah Code Ann. Sec. 13-22-12(1)(b)(v), Pet. Cert. App. at 57a-58a. This exercise of censorial power is unconstitutional. As Justice Brennan stated in Riley, 487 U.S. at 791:

> "The very purpose of the First Amendment is to foreclose public authority from assuming guardianship of the public mind." To this end, the government, even with the purest of motives, may **not substitute its judgment as to how best to speak for that of speakers and listeners**; free and robust debate cannot thrive if directed by the government. We perceive no reason to engraft an exception to this settled rule for charities. [Citation omitted, emphasis added.]

Contrary to the erroneous assumption of the court of appeals below, this case does not concern the constitutionality of the discretion of a government official in relation to the use of government-owned property. *See* Pet. Cert. App. 10a. Rather, it concerns the discretion that a government official has over the private mail box of a householder. According to this Court's ruling in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), the **only** discretion that a government official has with respect to a piece of mail, if it is otherwise legal, is to honor the discretion of the householder: "[w]e have never held

that the government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." *Id.* at 72. The householder, not the government, must decide whether mail is misleading, and therefore, worthy of the trash can, or the kitchen table for family discussion and consideration. As Justice Scalia stated in his concurring opinion in Riley, "it is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them." 487 U.S. at 804.

III. THE DECISION OF THE COURT OF APPEALS TO APPLY "AN INTERMEDIATE LEVEL OF SCRUTINY" TO THE UTAH ACT CONFLICTS WITH APPLICABLE PRECEDENTS OF THIS COURT.

A. The Court Below Applied Inapplicable Supreme Court Precedents.

The court below subjected the Utah Act to "'an intermediate level of scrutiny'" on the grounds that it is a "[c]ontent neutral regulation of protected speech." The court reached the conclusion that the Utah Act was "content neutral" solely on the basis that the Act was "designed not to 'suppress the expression of unpopular views' but rather to control the 'secondary' effects of speech." In support of this proposition, the court relied upon only one case, Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). Here again, the court of appeals has relied upon a precedent that demonstrably does not apply to this case.

Renton dealt with a city zoning ordinance that applied only to "adult motion picture theatres." Accordingly, this Court followed a special rule governing "zoning ordinances designed

to combat the undesirable secondary effects" of "businesses that purvey sexually explicit materials," *id.* at 49, supporting that special rule on the grounds that "'society's interest in protecting this type of expression is of a **wholly different, and lesser, magnitude** then the interest in untrammeled political debate....'" *Id.* n.2., *quoting* Young v. American Mini Theatres, 427 U.S. 50, 70 (1976) (plurality opinion).

As Justice Scalia recently observed, "our society, like other free but civilized societies, has permitted restrictions upon the **content** of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992) (emphasis added). And as Justice Scalia has further explained, the categories of "low" value speech have increasingly **narrowed**, not broadened, as the court of appeals below erroneously assumed when it extended to core First Amendment speech special rules designed only for fringe First Amendment speech. *See id.* at 383-84.

Had the court below correctly applied this Court's precedents, it would have found that the First Amendment standard of "content neutrality" was not met, as it was in Renton, solely because the Utah Act was not designed to "suppress the expression of unpopular views." Rather, as this Court ruled in Riley, **a charitable solicitation case,** the standard of "content neutrality," applicable to a core First Amendment speech case, also requires that a law not discriminate on the basis of subject matter. Thus, this Court has specifically ruled that core political speech cannot be parsed, as if it were a commercial advertisement, to separate out that which is subject to the state's interest in preventing fraud. Riley, 487 U.S. at 795-96. Yet, that is exactly what the court of appeals did, focusing only upon the "secondary effects" of charitable solicitations. Had it

correctly subjected the Utah Act "to exacting First Amendment scrutiny," as required by Riley, 487 U.S. at 798, it would have found that the Utah Act is **not** content neutral.

B. The Utah Act is Not Content Neutral.

Just because a law targets fraud or misrepresentation does not make it content neutral. After all, the North Carolina Charitable Solicitations Act in Riley targeted "fraud," but this Court found the requirement that professional fundraisers make certain disclosures to potential donors to be "a content-based regulation of speech." 487 U.S. at 795. Here also the Utah Act is content-based, even though it is designed to prevent fraud.

The Act does not apply to all charitable solicitations in the state. Section 13-22-8 contains 10 exemptions, including charitable solicitations conducted by a "bona fide religious, ecclesiastical or denominational organization," solicitations by "broadcast media owned and operated by an educational institution or governmental entity, or any entity organized solely for the support of that broadcast media," "any school accredited by the state, any accredited institution of higher learning, or club or parent, teacher, or student organization within and authorized by the school in support of the operations or extracurricular activities of the school," and "a public or higher education foundation established under Title 53A or 53B."

In City of Ladue v. Gilleo, 512 U.S. 43, 52 (1994), this Court warned that a city sign ordinance, allegedly designed to achieve environmental and safety objects, but which contained (coincidentally) 10 "[e]xemptions from an otherwise legitimate regulation of a medium of speech," may "diminish the credibility of the government's rationale for restricting speech in the first place." Such "under-inclusiveness" triggers strict scrutiny to determine if the exemptions relate solely to the non-speech

reasons for the statute. This Court found a city ordinance unconstitutional because it excepted "peaceful picketing of any school involved in a labor dispute" from its ban on picketing near schools. Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 100-101 (1972). As this Court reiterated in City of Cincinnati v. Discovery Network, 507 U.S. 410, 416 (1993), it "was the city's burden to establish a 'reasonable fit' between its legitimate interests of safety and esthetics and its choice of a limited and selective prohibition ... as the means chosen to serve those interests."

It was not enough, then, for the circuit court to accept the Utah claim that the law was aimed only at the "secondary effects of increased fraud and misrepresentation." *See* Pet. Cert. App. at 4a, n. 1. To the contrary, the Utah Act should have been strictly scrutinized to determine if the 10 categories of charitable solicitations exempted from the Act did not raise the same risk of "increased fraud and misrepresentation" as the charitable solicitations subject to the law.

This error was compounded by the circuit court's refusal even to acknowledge that the Act singles out charitable solicitations by direct mail for special regulation, leaving commercial solicitations by direct mail unregulated. Such a preference for commercial over noncommercial speech has been found by this Court to be unconstitutional. Metromedia, Inc. v. San Diego, 453 U.S. 490, 521 (1981) (plurality opinion).

C. The Utah Act Serves No Compelling Interest and Employs Impermissible Means to Prevent Fraud and Misrepresentation.

In Simon & Schuster, Inc. v. N.Y. Crime Victims Board, 502 U.S. 105, 115 (1991), Justice O'Connor wrote that a "statute is presumptively inconsistent with the First Amend-

ment if it imposes a financial burden on speakers because of the content of their speech." This principle, she noted, not only applies to a tax, but also to any regulation which imposes a financial burden upon some speakers, but not others, on the basis of the content of their speech: "In the context of financial regulation, it bears repeating," Justice O'Connor explained, "that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Id.*, at 116.

The court of appeals completely disregarded this well-established principle, ruling that the financial burdens, except for the bonding or letter of credit requirement, served only "the state's substantial interest in fighting fraud" and "defray[ed] reasonable administrative costs." Pet. Cert. App. at 6a-7a. According to Simon & Schuster, however, the correct inquiry is whether the Utah Act "imposes a financial disincentive only on speech of a particular content." 502 U.S. at 116. That inquiry can only be answered by examination of the statutory language laying out the qualifications set for claiming exemption from the Act.

According to Utah Code Section 13-22-5(b) "a bona fide religious, ecclesiastical or denominational organization" may claim an exemption if the charitable solicitation "is made for a church, missionary, religious or humanitarian purpose." According to Section 13-22-5(c), an "entity organized solely for the support of [certain] broadcast media" may claim exemption for charitable solicitations related to the support of such broadcast media. Section 13-22-5(g) exempts certain accredited schools and universities for charitable solicitations "in support of the operations or extracurricular activities of the school." These three examples alone demonstrate that ATA and Judicial Watch, and other organizations and solicitations

that do not qualify for any exemption, face a "financial disincentive" that the exempted organizations do not face.

Applying strict scrutiny, the Utah Act may be sustained only if it "'serves a compelling state interest and is narrowly drawn to achieve that end.'" *Id.* at 118. Although Utah may have an interest in protecting its residents from fraud and misrepresentation, the state legislature's exemption of 10 categories of charitable solicitations from regulation by this Act alone casts significant doubt upon the "strength" of the interest in preventing fraud and misrepresentation. If the state's interest were compelling, there would have been full coverage without exception. *See* City of Ladue, 512 U.S. at 53.

Not only is the claim that the Utah Act serves a compelling state interest weakened by the statutory exemptions, but those exemptions also weaken the claim that the statute is narrowly drawn to achieve the state's goal. The question here is whether Utah may single out some fundraising counsel and impose upon those persons — but not others — duties to register and disclose certain information as a preventive measure to combat "increased fraud and misrepresentation." According to this Court's precedents, the answer is no. Such a law is "impermissibly **underinclusive**" (*id.* at 51, emphasis added), because such increased risk "'can be controlled by narrowly drawn statutes' ... focusing on the abuses and dealing **even-handedly**" with charitable solicitations "regardless of subject matter." Police Dept. of Chicago v. Mosley, 408 U.S. at 102.

IV. THE COURT OF APPEALS DISREGARDED THIS COURT'S APPLICABLE PRECEDENTS AND ERRONEOUSLY DENIED THE PETITIONER'S COMMERCE AND DUE PROCESS CLAIMS.

A. The Court of Appeals Ignored This Court's Minimum Standard Prohibiting Extraterritorial State Regulations under the Commerce Clause.

Utah asserted, and the court of appeals found, that the Utah Act did not regulate ATA's conduct outside of Utah's borders. Supporting its finding, the court of appeals attempted to distinguish this case from Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986). The court of appeals missed the point of Brown-Forman, because it failed to acknowledge that the practical effect of the Utah Act is to regulate activities wholly outside the state, which, in turn, exposes nonresidents to the likelihood of "inconsistent obligations in different states." Brown-Forman, 476 U.S. at 583.

Furthermore, Utah's claim that it has jurisdiction over an out-of-state business that does not even conduct business in the state is so far-reaching that, if accepted, it would seriously undermine the constitution's commitment to the free flow of interstate commerce. In Edgar v. MITE Corp., 457 U.S. 624, 641 (1982), this Court addressed the constitutionality of an Illinois statute that "directly regulate[d] transactions ... wholly outside the State of Illinois." Recognizing its "sweeping extraterritorial effect," this Court found the Illinois law invalid solely because it "purport[ed] to regulate directly and to interdict interstate commerce, including commerce wholly outside the State." *Id.*, 457 U.S. at 642-43. This *per se* rule of unconstitutionality was reaffirmed in Healy v. The Beer Institute, 491 U.S. 324, 336 (1989), where Justice Blackmun wrote that

"[t]aken together, our cases concerning the extraterritorial effects of state economic regulation stand **at a minimum** for the ... proposition [that] the 'Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" (Emphasis added.)

B. The Court Below Also Misapplied this Court's Jurisdictional Tests for State Regulations Under the Commerce and Due Process Clauses.

The only territorial connection that ATA had with the State of Utah is that its client, Judicial Watch, chose to solicit, by direct mail, contributions from Utah residents. According to National Bellas Hess, Inc. v. Dept. of Revenue, 386 U.S. 753, 758-60 (1967), use of the mails to solicit business and deliver goods is not a sufficient nexus under the Commerce Clause to justify requiring the mailer to collect a use tax. That bright-line rule was expressly affirmed in Quill Corp. v. North Dakota, 504 U.S. 298, 314-15 (1992).

According to the court of appeals, however, that bright-line rule applies only to tax burdens, not "licensing and registration requirements." Pet. Cert. App. at 18a-19a. The court is seriously mistaken. As this Court stated in Quill, the Commerce Clause's requirement that there be a "substantial nexus" between the taxing state and the person burdened with collecting the tax reflects "structural concerns about the effects of state **regulation** on the national economy." 504 U.S. at 312 (emphasis added). Indeed, the burdens imposed in National Bellas Hess and Quill were not a "tax" *per se*, but a regulation requiring the collection of a tax owed not by the out-of-state seller, but by the in-state buyer. The court of appeals erred, therefore, in limiting the reach of the "substantial nexus" test to a "formalistic" distinction between a "tax burden" and a

"licensing and registration requirement." *See* Quill, 504 U.S. at 314-15.

Not only did the court of appeals seriously mistake the jurisdictional rule under the Commerce Clause, but it erroneously assumed that the Due Process rule that governs the exercise of state judicial power is identical to the one governing the exercise of legislative power. *See* Pet. Cert. App. at 19a-20a. Chiding ATA for claiming that the Due Process rules are different "[w]ithout apparent authority," the Court of Appeals ignored Justice Scalia's concurring opinion, joined in by Justices Kennedy and Thomas, in Quill that stated their "understand[ing] ... that the due process standards for adjudicative jurisdiction and those for legislative (or prescriptive) jurisdiction are [not] necessarily identical...." 504 U.S. at 319-20. Indeed, this Court's ruling in American Oil Co. v. Neill, 380 U.S. 451 (1965), demands more contacts with a taxing state than mere "purposeful availment" in order to justify the imposition of a tax on revenues generated by activi-ties taking place wholly outside the taxing state. Likewise, here, the imposition of burdensome regulatory requirements upon ATA's activities taking place wholly outside of the State of Utah demands more contact with Utah than knowing that some of the direct mail of a national solicitation campaign was "purposefully directed" to Utah residents.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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